



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2010

Mr. William G. Walston, Jr.
William G. Walston, Jr., P.C.
P.O. Box 1154
Rockport, Texas 78381-1154

OR2010-10340

Dear Mr. Walston:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 386410.

The Rockport Police Department (the "department"), which you represent, received a request for (1) information relating to a specified case, including records of interviews of two named individuals, and (2) other law enforcement information relating to one of the named individuals. The department's communications with the requestor indicate that it has no information that would be responsive to part two of the request.¹ You state that some of the information encompassed by part one of the request has been released. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

You also appear to contend that the instant request for information was not a valid request for purposes of the Act. You state that the instant request was submitted by e-mail to an

¹We note that the Act does not require the department to release information that did not exist when it received this request, create responsive information, or obtain information that is not held by the department or on its behalf. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

employee of the department. Section 552.301(c) of the Government Code provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." Gov't Code § 552.301(c). You indicate that the employee who received the instant request is neither the department's public information officer nor a person authorized by the public information officer to receive a request submitted by e-mail. Nevertheless, the department has released responsive information to the requestor, requested a decision on the submitted information, and otherwise treated the instant request as having been properly submitted. Accordingly, we will determine whether the information at issue is excepted from disclosure.

We note that the department did not comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that must be followed in asking this office to determine whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.301(b) requires a governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) provides that a governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You state that the department received the instant request for information on March 30, 2010; therefore, the department's deadlines under subsections 552.301(b) and 552.301(e) were April 13 and April 20, respectively. The department requested this decision by United States mail postmarked May 6. Thus, the department did not comply with section 552.301, and the submitted information is therefore presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). The department claims section 552.108 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't

Code § 552.108 subject to waiver). The department's claim under section 552.108 is not a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, the department has waived section 552.108 and may not withhold any of the submitted information under that exception. The department also claims section 552.101 of the Government Code, which can provide a compelling reason for non-disclosure. Accordingly, we will determine whether section 552.101 is applicable in this instance.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Mental health records are confidential under section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

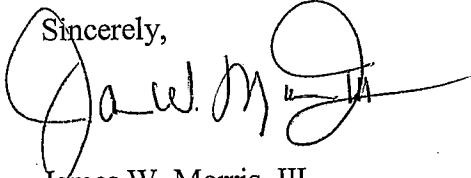
Health & Safety Code § 611.002(a)-(b); *see id.* § 611.001 (defining "patient" and "professional"). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to information that section 611.002 makes confidential only by certain individuals. *See id.* §§ 611.004, 611.0045; Open Records Decision No. 565 (1990). We find that section 611.002 is applicable to the submitted information. We therefore conclude that the department must withhold the information at issue in its entirety under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code, unless the requestor is authorized to obtain the submitted information under sections 611.004 and 611.0045. *See* Health and Safety Code § 611.004(a)(4) (professional may disclose confidential information to person who has patient's written consent or to parent of minor patient). As we are able to make this determination, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/tp

Ref: ID# 386410

Enc: Submitted documents

c: Requestor
(w/o enclosures)